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NATIONAL BANKS AS FIDUCIARIES.

Ever since the passage by Congress in 1913 of the Federal Reserve Act, opinion both of lawyers and of courts has been divided upon the validity of the provision which purports to authorize a national bank to act as executor, administrator, trustee or registrar of stocks and bonds—in a word, to exercise the functions in the particulars mentioned of an individual or trust company.

Section 11k of the Act (38 Stat. at L. 251, 262, 9 U. S. Comp. Stat. Ann. sec. 9794k) confers the following power upon the Federal Reserve Board:

> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

No particular interest in the question has been expressed in Virginia since the passage by its General Assembly of the Act of March 29, 1915 (Acts 1915, p. 52, 4 Pollard's Supp. p. 1020) providing that

> "All national banks which have been or may hereafter be permitted by law to act as trustee and in other fiduciary capacities shall have all the rights, powers, privileges and immunities conferred upon trust companies"

by general legislation. This statute was enacted in the light of and doubtless as a complement to the federal statute, *supra*, and effectually disposed of any contention that may have been theretofore maintainable that the exercise by a national bank of the fiduciary powers mentioned is either expressly or by implication "in contravention of State or local law" in Virginia.

The course of the national banks did not run so smoothly, however, in New York and certain other States. The trust companies, always cordial allies of the banks when their interests do not conflict, were not disposed to divide the fiduciary

field with its valuable commissions and other incidents and strenuously opposed any action by the legislature of New York looking to the recognition of national banks as fiduciaries. In Illinois and Michigan also the question was agitated. "Has it come to this?" said the trust companies, many of their officers appreciating doubtless for the first time the beauties of the doctrine of States' rights and the battle cries of half a century and more ago. "Can it be that Congress can authorize a corporation, foreign at least in the sense that it is not of the State's creation, to enter the probate courts of a State and qualify upon the estates of its dead citizens?" The shades of John C. Calhoun and others *ejusdem generis* were solemnly invoked and test cases were made up. The situation was therefore not without its humorous features.

One of the first reported cases was that of *People* v. *Brady, Auditor,* decided December 22, 1915, 217 Ill. 100, 110 N. E. 864. The People, at the relation of the First National Bank of Joliet, Illinois, filed in the Supreme Court of the State an original petition for mandamus, averring that relator was a national bank and a member of the Federal Reserve system; that the Federal Reserve Board had upon relator's application, granted it a permit to act as trustee, etc.; that upon the issuing of such permit, relator applied to Brady, Auditor of Public Accounts of Illinois, for a certificate of authority to act under what is generally known as the Trust Act of the State and that the Auditor has refused to issue the certificate. A peremptory mandamus was accordingly prayed for.

Respondent demurred to the petition upon the following grounds: (1) That section 11k of the Frederal Reserve Act is a delegation of power to the Federal Reserve Board and was for that reason void; (2) that if not such an invalid delegation, it was unconstitutional and void for want of power in Congress to grant such a franchise to a national corporation; (3) that to permit national banks to act as fiduciaries would be in contravention of the laws of Illinois.

The court overruled the demurrer upon the first ground and sustained it upon the others. It met the constitutional question squarely with the following response:

The power to regulate property within the limits of the

State, the modes of acquiring and transferring it, and the rules of descent and distribution dealt with by trustees, executors, etc., are subjects belonging exclusively to the jurisdiction of the State are not subject to federal control.

The opinion was delivered by Chief Justice Farmer and is an able and clear statement of the reasons for the negative of the question. The following extract is a summary of the whole:

"We come, then, to the inquiry whether Congress has the power to authorize a banking corporations created by it, to engage in the business of acting as trustee, executor of wills, administrator of estates, or registrar of stocks and bonds. If such power exists, it must either be because Congress has the power to create a corporation for that purpose, or because the possession of such power by corporations (which) Congress has the power to create is necessary to the continued existence of the corporations. It will not be contended Congress has the power to create corporations for the sole purpose of acting as trustees, executors, or administrators, and it has not attempted to do so. Such corporations could not be made the instrumentalities for carrying out governmental functions. The business of such corporations appertains to private property rights under the laws of the several states, their devolution, descent and distribution. These are subjects of regulation by the states and not subject to the control of Congress. United States *v.* Fox, 94 U. S. 315; Pennoyer *v.* Neff, 95 U. S. 714; Brown *v.* Fletcher, 210 U. S. 702; Yonley *v.* Lavender, 88 U. S. (21 Wall.) 276; Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211.

"Trust companies or corporations organized for the purpose of acting in trust capacities are very different from banking corporations. Since Congress has no express or implied power to create trust companies to act as trustees etc., the nature and character of their business making them the creatures of the various states, Congress could only vest national banking corporations with such powers if they were reasonably necessary to the efficiency of such corporations for the purposes of their creation as governmental agencies. National banks without the power to act as trustees, etc., have efficiently served the governmental purposes for which they were created, and it not being shown such added powers are now necessary to the further success of such purposes, and we being of opinion the powers attempted to be conferred by Congress belong strictly to the states, we think the act, in so far as it at-

tempted to confer such powers upon national banks, is unconstitutional and void."

The court then took up the consideration of the clause "when not in contravention of state or local law," and upon this interesting point it said:

"It may well be doubted whether a corporation created by act of Congress for a national governmental purpose, considered either as a foreign or domestic corporation, could be construed to be within the meaning of the state statute" (the State Bank Act, the Trust Act and the General Incorporation Act of Illinois);" but, however that may be, we are of opinion permission to a national bank to act as trustee, etc., is in contravention of the state law, and such permission is authorized by the Federal Reserve Act only 'when not in contravention of state or local law.'"

The opinion concludes with an amplification of the first proposition, *supra*. Such is the negative view of the question and so well is it presented in the opinion that no attempt is made to enlarge upon it here.

In the same month that the *Brady* case was decided, the Supreme Court of New Hampshire passed upon the question, but from another point of view. The legislature of that State had enacted in 1915 the rather sweeping provision that

"No trust company, loan and trust company, loan and banking company, or similar corporation, shall hereafter be appointed administrator of an estate, executor under a will, or guardian or conservator of the person or property of another."

It would be interesting to pause and discuss the policy of this statute and the reasons that may have led to its enactment, certain of which are suggested in the opinion presently to be mentioned, but lack of space forbids. One Henry W. Woodbury filed a petition for the appointment of the First National Bank of Concord, New Hampshire, as administrator of the estate of Nellie E. Woodbury. The lower court denied the petition on the ground that the probate court had no power to make the appointment. Upon appeal the order was affirmed. *Appeal of Woodbury*, 96 Atl. 299—December 7, 1915. The only constitutional question discussed in the opinion was the contention of the petitioner that the statute above quoted was void as class legisla-

tion, but this was denied. The ruling of the court was, in a few words, that although section 11k of the Federal Reserve Act was enacted before the New Hampshire statute, the prohibition of the latter, operating upon the power of the probate court to make the appointment of administrators, etc., is nevertheless effective. Said Walker, J:

> "It is clear that the language of the Reserve Act does not lead to the conclusion that the legislature of this state could not subsequently provide that national banks should not act as administrators, or that the probate courts should not subsequently appoint them to such positions. The power of the state over the probate courts is exclusive, and they have such powers and only such as the legislature gives them. The act of Congress was not an attempt to invest probate courts with a power of appointment they did not possess before, but it was an authorization to national banks to accept appointments when the probate courts were authorized to make them. As these courts can not now make such appointments, it necessarily follows that national banks can not be appointed. They have no vested right to exercise that trust, and can only enjoy the privilege when the appointing power is authorized to appoint them."

Such is the negative view of the question, both generally and specially. The broader ruling was followed to the end by the Supreme Court of Michigan in *First National Bank of Bay City* v. *Fellows,* 159 N. W. 335, decided September 26, 1916. The bank, having obtained from the Federal Reserve Board the required certificate, commenced without more to exercise the fiduciary functions designated in the federal act. Thereupon certain trust companies petitioned the Attorney General of Michigan to test the right of the bank on the ground that its doing so was contrary to the laws of the State of Michigan and that the action of the Federal Reserve Board, purporting to confer the authority, was in contravention of the Constitution of the United States. A quo warranto proceeding was accordingly instituted and the case was heard upon his demurrer to the answer of the bank, the grounds being the same as in the Illinois case, *supra.* It was held by the Supreme Court of Michigan that the bank was without power to exercise the functions sought to be conferred by section 11k, Congress having exceeded its constitutional powers.

Concurring opinions were delivered. That, apparently, of the court, referred to *M'Culloch* v. *Maryland* and *Osborn* v. *Bank* and to passages in the opinions in those cases, upholding the rightful possession by the bank of both public functions and private banking attributes and stated the grounds which led the Michigan court to the conclusion that the rulings in the decided cases were distinguishable and therefore not controlling. The concurring opinion, by Ostrander, J., concludes:

> "But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that Congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of Federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the state which controls not only the devolution of estates of deceased persons and the conducting of private business in the state, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency."

The bank, thus denuded of the powers which it had been advised Congress had conferred upon it, promptly sought a review of the judgment by the Federal Supreme Court, which on June 11, 1917, unanimously reversed the Michigan court, two members of the court dissenting upon the single ground that the majority did not go far enough—that they did not hold that a state court can not entertain a proceeding calling in question the right of a national bank to exercise a right conferred by Congress.

The opinion was by Mr. Chief Justice White and certainly does not lack in distinctness of expression. After having stated fully the ruling of the Michigan tribunal and its reasons therefor, as given in the paragraph last quoted, the courts says:

"But *we* are of opinion that the doctrine thus announced not only was *wholly inadequate to distinguish the case before us from the ruling in M'Culloch* v. *Maryland and Osborn* v. *Bank of United States,* but, on the contrary, *directly conflicted with what was decided in those cases;* that is to say, *disregarded their authority* so as to cause it to be our duty to reverse for the following reasons:" (italics the present writer's)

These reasons were, briefly, first, because the opinion of the lower court, instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular function from the other attributes and functions of the bank, *and ascertained the existence of the implied authority to confer them by considering them as segregated.*

Second, because while in the premise to the reasoning, the right of Congress was fully recognized to exercise its legislative judgment, in application its discretion was disregarded or set aside.

Third. Because even under this mistaken view, the conclusion that there was no ground for implying the power of Congress was erroneous because it was based on a mistaken standard, since it considered not the actual situation, that is, the condition of the state legislation, but an imaginary or non-existing condition, that is, the assumption that the particular functions were in the state enjoyed only by individuals or corporations not coming at all, actually or potentially, in competition with national banks.

Fourth. The reference of the lower court to the state authority over the particular subjects with which the statute deals must have proceeded upon the erroneous assumption that, because a particular function was subject to be regulated by state law, therefore Congress was without power to give a national bank the right to carry on such functions. "But," says the Supreme Court, "if this be what the statement signifies, the conflict between it and the rule settled in M'Culloch *v.* Maryland and Osborn *v.* Bank of United States is manifest."

The opinion can not be reproduced here, but it should be

read as a whole, and carefully (37 S. C. R. 734), for it will be a landmark in constitutional law. It does not even cite the Illinois decision. It smashes with one blow all previous rulings directly in conflict and finally settles the question. The nature of this article is editorial rather than controversial, its purpose being to call attention to an important ruling, not to express an opinion as to which is the sounder of the opposing views. Cui bono? That opinion would after all be apt to depend largely upon the school of political thought in which one has been reared. would consume much time and all to no purpose. For the question is no longer open. M'Culloch *v.* Maryland and Osborn *v.* Bank have received their capstone, and this portion of our political edifice at least is complete. The word "Nation" will continue to be spelled with a capital initial and the end of the matter recognized by the profession and the public, namely, that when Congress has created an agency of any kind, be it bank Commerce Commission, Bureau of Food Control, or anything else, and has endowed it with certain functions necessary, *in the judgment of Congress,* to effective operation, there can be no question as to the validity of the powers conferred and litigation to restrain their exercise will merely be futile. The hands of the clock set in motion by M'Culloch *v.* Maryland have never gone backward in the century which has nearly elapsed since the decision of that case, and, in the judgment of the writer, they never will.

It is, however, believed that the judgment does not control the question presented by the New Hampshire case, *supra,* namely, that of a state statute providing in effect that *no corporation* may exercise the fiduciary powers mentioned. Congress expressly forbids their exercise by national banks when in contravention of state or local law, and, until it removes this qualification, the extension by the courts to national banks of fiduciary rights would render the clause in question meaningless.

GEORGE BRYAN.

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